

**BEFORE THE
POSTAL REGULATORY COMMISSION**

Competitive Product Prices
Parcel Select
Parcel Select Contract 44

Docket No. MC2021-42

Competitive Product Prices
Parcel Select Contract 44 (MC2021-42)
Negotiated Service Agreement

Docket No. CP2021-43

**OPPOSITION OF AMAZON.COM SERVICES LLC TO MOTION BY STRATEGIC
ORGANIZING CENTER FOR ACCESS TO NON-PUBLIC MATERIALS**
(August 22, 2022)

Pursuant to 39 C.F.R. § 3011.301(c), Amazon.com Services LLC (“ASL”) respectfully files this opposition to the August 15, 2022 motion by Strategic Organizing Center (“SOC”) for access to non-public materials.¹ SOC seeks “access to the full, unredacted versions of the most commercially significant negotiated service agreement (NSA) currently in effect between the United States Postal Service (USPS or Postal Service) and Amazon.com, Inc. (Amazon), and the supporting Governor’s Decision.”²

As the Postal Service has noted, if such a contract existed with ASL, or any other commercial partner of the Postal Service, the terms of such contract would likely limit ASL’s, or any other commercial partner’s, ability to disclose the existence or the substance of the contract without consent.³ Accordingly, ASL cannot confirm whether the contract SOC seeks is ASL’s; but the identity of the contract party is immaterial to ASL’s position. The non-public version of any

¹ See Motion by Strategic Organizing Center Requesting Access to Non-Public Materials Under Protective Conditions (August 15, 2022)(SOC August 15 Motion).

² SOC August 15 Motion at 1. SOC states that the August 15 Motion seeks access to the same materials requested in SOC’s May 12, 2022 Motion for access to non-public materials that was previously denied by the Commission.

³ See Joint Statement of the United States Postal Service and the Strategic Organizing Center Pursuant to PRC Order 6189 (Aug. 5, 2022) at 2.

individual negotiated service contract would contain specific commercial information, including specific price and escalation terms, volume projections, and marketing strategies, that are of extreme competitive sensitivity to the Postal Service and its commercial partners.

The issues raised by this motion also implicate the interests of mailers and end customers who rely on the Postal Service to provide reliable and affordable delivery services nationwide. The growth and profitability of the Postal Service's competitive package products business is critical to the Postal Service's financial viability. The success of the Postal Service's competitive package business is predicated on the Postal Service's ability to offer confidential service contracts to its commercial partners, which is in turn predicated on these partners' assurance that the contracts will in fact be maintained as confidential.⁴ Allowing third-parties to access extremely sensitive commercial contract information on the basis of unsupported allegations and speculation will set a precedent that creates a business risk for shippers and results in a chilling effect on the Postal Service's ability to compete in the highly-competitive package delivery business. Despite the integrity of the Commission's protective conditions, as a pragmatic concern, increased access will necessarily lead to an increased risk of disclosure, especially where other avenues exist for this purpose. Moreover, the commercial harms to third-parties, the Postal Service, and fair competition are the very same in the event of an inadvertent disclosure.

SOC's attempt to use the Commission's access rules for pre-litigation discovery is procedurally improper. Granting SOC's request for access in this case would be inconsistent with Commission precedent, would create impermissible tension between the Commission's access rules

⁴ During FY 2021, there were 800 Competitive domestic products consisting of NSAs. Docket No. ACR2021, Annual Compliance Determination Report Fiscal Year 2021, at 78 (Mar. 29, 2022). As of May 1, 2022, the Commission has approved 62 NSAs in 2022 alone. *See* Negotiated Service Agreements (NSAs) Statistics May 2022 Update, at 1 (May 1, 2022). <https://www.prc.gov/sites/default/files/May%20NSA%20Monthly%20Summary%202022%20.pdf>. According to the USPS OIG, in 2020, "40 percent of the Postal Service's 5.5 billion domestic package volume is mailed under these agreements." *Negotiated Service Agreement Contract #50593050, Report Number 20-206-R20*, USPS Office of Inspector General, at 3 (Sept. 10, 2020). Postal Service package volume increased to 7.6 billion in 2021, up from 3.5 billion in 2012. *See* A Decade of Facts and Figures (last updated Sep. 30, 2021), <https://facts.usps.com/wp-content/uploads/A-Decade-of-Facts-and-Figures.pdf>.

and the statutory and regulatory complaint provisions, and would deviate from the Commission’s long-standing practice of establishing discovery procedures consistent with practice under the federal rules of civil procedure. Even assuming the access rules are an appropriate vehicle for SOC’s request, requests for access to non-public materials must contain a “detailed statement justifying the request for access.”⁵ SOC has not and cannot meet that standard. For the reasons discussed below, the motion should be denied with prejudice.

BACKGROUND

On May 12, 2022, SOC filed a motion with the Commission requesting access to the unredacted versions of what it describes as the “most commercially significant” NSA currently in effect between the Postal Service and Amazon.⁶ SOC describes itself as “a non-profit research and advocacy organization supported by a coalition of labor unions,”⁷ and it admits that “[n]either SOC as an organization nor its individual counsel have any affiliation with the delivery services, communications, or mailing industries[.]”⁸ SOC’s motions provide that it is seeking access to aid its preparation of a complaint pursuant to 39 U.S.C. § 3662. SOC states its complaint will be based on undescribed “troubling evidence” from an unspecified number of unnamed Postal Service employees that SOC reportedly surveyed and interviewed. SOC states that it plans to file a complaint pursuant to section 3662, alleging violations of sections 101(b), 101(e), and 403(c) of title 39 of the U.S. Code. SOC’s May 12 Motion was opposed by the Postal Service and the Package Shippers Association.⁹

⁵ 39 C.F.R. § 3011.301(b)(2)

⁶ See Strategic Organizing Center’s Motion Requesting Access to Non-Public Materials Under Protective Conditions (May 12, 2022)(SOC May 12 Motion); SOC August 15 Motion at 1.

⁷ SOC May 12 Motion at 5.

⁸ *Id.*

⁹ See Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials (May 18, 2022); Response of the Package Shippers Association in Opposition to Motion for Access to Non-Public Materials (May 19, 2022).

On June 6, 2022 the Commission issued Order 6189,¹⁰ which denied SOC's May 12 Motion without prejudice. Because the Commission ruled that SOC had filed its motion in the wrong docket and could not satisfy the threshold relevancy requirements of 39 CFR § 3011.301(b)(2)(ii), it did not otherwise rule on the merits of the request. The Commission instructed the Postal Service and SOC to meet and confer in a good faith attempt to narrow or resolve the disputed issues and file a joint statement within 60 days.¹¹

The parties filed a joint statement on August 5, 2022 summarizing the meet and confer proceedings. Also on August 5, in contravention of the Commission's instructions in Order No. 6189 and without notice to the Postal Service, SOC filed a "supplemental submission" urging the Commission to grant it immediate access.¹²

On August 12, 2022 the Postal Service filed a response urging the Commission to disregard SOC's supplemental submission as unauthorized and improper.¹³ The Postal Service further requested that the Commission provide clarification on the procedural posture of the proceedings. Before the Commission could respond to the Postal Service's motion, SOC filed the instant motion for access in the above-captioned docket, which was dated and stamped as filed on August 15, 2022.

ARGUMENT

To gain access to a non-public materials under Commission Rule 3011.301, a party must submit a "detailed statement providing justification for access."¹⁴ The Commission's Rules allow motions for access for the purpose of "aid[ing] participation in any pending Commission proceeding . . . (including compliance proceedings)" or "aid[ing] the initiation of a proceeding before the

¹⁰ See Docket Nos. MC2021-115 and CP2021-117, Order Denying Motion for Access Without Prejudice and Holding Proceedings in Abeyance Pending Filing of Joint Statement (June 6, 2022)(Order No. 6189).

¹¹ *Id.* at 12.

¹² See Supplemental Submission Regarding Motion Requesting Access to Non-Public Materials Under Protective Conditions (Aug. 5, 2022)(SOC Supplemental Submission).

¹³ See USPS Response to Strategic Organizing Center Supplemental Submission and Motion for Clarification (Aug. 12, 2022).

¹⁴ 39 C.F.R. § 3011.301(b)(2).

Commission.”¹⁵ SOC did not participate in the MC2021-42, CP2021-43, or CP2021-117 dockets, and it does not claim that it seeks access to the non-public materials for purposes of reopening these dockets. SOC’s request thus cannot be justified under 39 CFR § 3011.301(b)(2)(i).

Accordingly, SOC’s request must be evaluated as a request for access for the purpose of aiding the initiation of a proceeding before the Commission under 39 CFR § 3011.301(b)(2)(ii). That rule requires SOC to provide a “detailed statement justifying the request” and “describe the subject of the proposed proceeding, how the materials sought are relevant to that proposed proceeding, and when the movant anticipates initiating the proposed proceeding.”¹⁶ If the movant carries its burden of providing a detailed statement justifying the request, then the Commission, in determining whether to grant a request for access to non-public materials, “shall balance the interests of the parties consistent with the analysis undertaken by a Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).”¹⁷

These standards require denial of SOC’s motion for access for several reasons. The regulatory history of Rule 3011.301 confirms that it was never intended to allow parties to engage in pre-litigation discovery in anticipation of filing a complaint under 39 U.S.C. § 3662. Construing Rule 3011.301 to allow access for purposes of pre-litigation discovery creates a needless and impermissible conflict between the access rules and the statutory provisions governing complaint proceedings. An expansive interpretation of Rule 3011.301 is also inconsistent with practice under the Federal Rules of Civil Procedure. Additionally, even assuming SOC’s request is appropriate under Rule 3011.301, SOC has failed to make the threshold showing under Rule 3011.301, and even if it had, the balance of interests analysis would require denial of the request.

¹⁵ 39 C.F.R. § 3011.301(b)(2)(i); 39 C.F.R. § 3011.301(b)(2)(ii).

¹⁶ 39 C.F.R. § 3011.301(b)(2); 39 C.F.R. § 3011.301(b)(2)(ii).

¹⁷ 39 C.F.R. § 3011.301(e).

A. SOC's Motion for Access Should be Denied with Prejudice as Procedurally Improper

1. Rule 3011.301 was never intended to be used for pre-litigation discovery.

As noted in Order 6189, Rule 3011.301(b)(2)(ii) was added in 2018 when the Commission expanded the scope of Rule 301.300 to allow parties to seek access for the purpose of aiding the initiation of a proceeding before the Commission.¹⁸ The regulatory history confirms that the changes to Rules 3011.300 and 3011.301 were intended to be technical enhancements to the then-existing rules, not a radical departure from the Commission's prior practice of regulating discovery. In fact, there is no support in the regulatory history to suggest that Rule 3011.301 was ever intended to be used for the purposes SOC seeks to use it in this case.

In Order No. 4403 the Commission summarized its proposed changes to Rule 3011.301, as follows:

On the other hand, proposed §§ 3007.301 and 3007.304 dispense with the division for access requests that pertain to general proceedings versus access requests that pertain to Annual Compliance Determination-related proceedings appearing in existing §§ 3007.40, 3007.41, 3007.42, 3007.50, 3007.51, and 3007.52. Because the procedures involved do not vary if the access request involves general proceedings versus compliance proceedings, this proposed change simplifies the rules.¹⁹

The detailed explanation of the proposed changes is as follows:

Proposed § 3007.300(c) mirrors existing § 3007.24(b) by explaining the circumstances and cross-referencing the relevant provision for other persons to obtain access (via proposed § 3007.301). Existing §§ 3007.40(a) and 3007.50(a) provide that a person may request access to non-public materials during a proceeding or relevant to compliance under 39 U.S.C. 3653. Through past practice, the Commission has determined that 3007.50(a) applies while a 39 U.S.C. 3653 compliance proceeding (proceedings using the designation "Docket No. ACR") is pending. Proposed § 3007.300(c) unifies existing §§ 3007.40(a) and 3007.50(a) to apply to an access request made for the purpose of aiding participation in a pending Commission proceeding (including a compliance proceeding). ***Consistent with past practice***, proposed § 3007.300(c) also expands the scope to allow a person to seek access for the purpose of aiding the initiation of a proceeding before the Commission.²⁰

¹⁸ Order No. 6189 at 9-10.

¹⁹ Docket No. RM2018-3, Notice of Proposed Rulemaking Relating to Non-Public Information (Feb. 13, 2018) at 5 (Order No. 4403).

²⁰ *Id.* at 22 (emphasis added).

Proposed § 3007.301 Motion for access to non-public materials. Proposed § 3007.301 concerns requests for access to non-public materials. This proposed rule combines the material of existing §§ 3007.40, 3007.42, 3007.50, and 3007.52, which have separate access rules for non-public materials based on whether or not the person seeking access seeks to use the materials in a compliance proceeding or other type of proceeding. Because this distinction does not produce a material difference in procedures, the Commission proposes to unify this content for simplicity.²¹

Notably, the statement “consistent with past practice” in Order No. 4403 is supported by a footnote highlighting, as an example, a request for continued access to non-public information filed in Docket No. ACR2014.²² There is no citation or support in Order No. 4403 to any prior example of the access rules being used for pre-litigation discovery. And no party has identified any prior instance in which the Commission’s access rules were used to engage in pre-litigation discovery. Accordingly, the statement that the proposed change to Rule 3011.300 was “consistent with past practice” could not and did not mean the Commission was revising the rule to allow its use for pre-litigation discovery purposes.

In fact, nowhere in Order No. 4403 does the Commission ever suggest, much less discuss, that the revisions to proposed Rules 3011.300 or 3011.301 were intended to encompass requests for access to non-public materials for pre-litigation discovery.²³ Nor do any of the comments filed on the proposed rule suggest that any party interpreted the rule as establishing an alternative vehicle for pre-litigation discovery. Similarly, there is no evidence that the Commission or any other interested party ever considered a “general proceeding” to encompass complaint proceedings under 39 U.S.C. § 3662. There is likewise no discussion in Order No. 4679, the Commission’s final order in Docket No. RM2018-3, that the changes to the access rules were intended to allow pre-litigation discovery to aid

²¹ *Id.* at 22-23.

²² *Id.* at 22, n. 13 (“See, e.g., Docket No. ACR2014, United Parcel Service, Inc.’s Motion Requesting Continued Access to Non-public Materials Under Protective Conditions, March 27, 2015, at 2.”).

²³ The only time the word “complaint” appears in Order No. 4403 is in a footnote providing an exhaustive enumeration of then-existing docket designations.

the preparation of a complaint under section 3662. In fact, the word “complaint” does not appear at all.

Order No. 6189 provided a summary of the arguments the Postal Service advanced in Docket No. RM2018-3, in favor of deleting proposed Rules 3011.300(c) and 3011.301(b)(2)(ii), and the Commission’s reasons for declining to adopt them.²⁴ While the Commission rejected the Postal Service’s arguments that parties should *never* be granted access to non-public materials in aid of initiating a proceeding, it in no way endorsed SOC’s view that the access rules must then apply for all purposes, including pre-litigation discovery.²⁵ Nor is pre-litigation discovery allowed because it was not expressly foreclosed. The Commission was simply recognizing past practice; it was not bypassing separate, well-established channels and safeguards governing discovery in Commission proceedings.

The regulatory history should be taken at face value. In view of the developments of the access rules from 2009 to 2018, the changes in Docket No. RM2018-3 were intended to accomplish the stated goals of making Rules 3011.300 and 3011.301 “more accessible to the public” by (1) deleting the historical distinction between general proceedings and compliance proceedings, (2) expanding the scope of the rules to permit access requests to aid parties seeking information to aid their participation or initiation of a future compliance or general proceedings, and (3) providing additional guidance on the basic elements of such requests necessary to support a finding of good cause. The Commission made clear that the changes to the rules, “consistent with past practice,” were intended to cover access requests for the use of non-public information in a future compliance proceeding or, for example, in aid of a future petition for a change in analytical principles, and not to authorize general pre-complaint discovery.²⁶ This reading is further supported by the fact that there

²⁴ Order No. 6189 at 10.

²⁵ *Id.* at 10-12.

²⁶ Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information (June 27, 2018), at 28-29 (Order No. 4679).

is no support in the regulatory history for interpreting the rule to allow, much less require, access in this case where SOC expressly acknowledges it is seeking the non-public information as a means of conducting pre-litigation discovery in aid of a future complaint. For the reasons discussed below, an expansive reading of the rule creates needless conflict with the existing complaint rules and would be inconsistent with practice before federal courts.

2. Construing the access rules as applicable to pre-litigation discovery creates an unnecessary conflict with the statutory complaint provisions and is inconsistent with federal practice.

The Commission's rules for taking discovery in complaint proceedings are well-established and provide important safeguards consistent with practice under the Federal Rules of Civil Procedure. The statutory provisions governing rate and service complaints expressly condition "proceedings," including discovery, upon the Commission's affirmative finding that "such complaint raises materials issues of fact or law."²⁷ Part 3022 of the Commission's rules follows this statutory construct.²⁸

Far from a justification under Rule 3011.301(b)(2)(ii), SOC's statement that it is requesting access to assess the validity of a future complaint is a disqualifying admission that its request is premature and procedurally improper. Setting aside the legal insufficiency of SOC's claims, if SOC believes the Postal Service is not operating in conformity with the law, it should lodge a complaint with the Commission as prescribed by Rule 3022.10. If and when SOC files a complaint it will need to clearly identify and explain how the Postal Service is violating applicable statutory standards and state, among other items, the evidentiary support SOC has and expects to obtain during discovery to support the facts alleged in the complaint.²⁹ Again, consistent with the statutory complaint provisions of section 3662 and the Commission's rules, discovery can only proceed on the basis of a

²⁷ 39 U.S.C. § 3662(b)(1)(A)(i).

²⁸ See 39 C.F.R. Part 3022.

²⁹ See 39 C.F.R. § 3022.10(a).

Commission finding that the complaint raises material issues of fact or law.³⁰ SOC has inverted this framework. Its motion for access requests pre-litigation discovery of extremely sensitive commercial information as part of a fishing expedition that may or may not give rise to a future complaint. The Commission should deny the motion as premature and improper on this ground alone.

Allowing SOC's request to proceed under the Commission's access rules would allow SOC to circumvent the statutory complaint provisions that affirmatively limit pre-litigation discovery. Even if there were support for SOC's interpretation that Rules 3011.300 and 3011.301 were intended to encompass complaint proceedings (there is none), such an interpretation would impermissibly nullify the statutory limitations of section 3662(b)(1)(A)(i). Any potential complainant could obtain via the access rules pre-litigation discovery of the very same information it would otherwise be prevented from seeking unless and until the Commission made an affirmative finding that the complaint raised a material issue of fact or law.

SOC's interpretation of the access rules as a tool for pre-litigation discovery is also inconsistent with practice under the Federal Rules of Civil Procedure. Under those established rules a party must first file a complaint that states a viable claim.³¹ If and only if a party can state a viable claim is it entitled to proportionate and relevant discovery.³² Further, if and only if the discovery is proportionate and relevant does the court engage in the balance of interests test under Rule 26(c) with respect to the need for protective conditions.³³ SOC's request for access again seeks to invert this established framework by claiming it cannot know whether it has a claim unless it is allowed pre-

³⁰ See 39 U.S.C. § 3662(b)(1)(A)(i); 39 CFR 3022.20.

³¹ Fed. R. Civ. P. 8(a).

³² Fed. R. Civ. P. 26(b)(1); See Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 2071 n.5 (3d ed. 2020) ("The type of fishing which the [Federal Rules of Civil Procedure] do not tolerate is fishing before action to try to discover some ground for bringing suit. No discovery process can be used by the plaintiff before he has filed his complaint." (quotation omitted)); see also *id.* ("In civil cases generally, a party is not entitled to discovery before an action is brought. Indeed, plaintiff may not seek discovery until after he has filed, not only a complaint, but a well-pleaded one.").

³³ See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case").

litigation discovery. Federal courts have repeatedly rejected this approach. See *In re of Lucille Holdings PTE, Ltd.*, No. 1:21-mc-99, 2022 EL1421816 (D.C. Cir. May 5, 2022) (“The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without* discovery, not to find out if it has any basis for a claim.”); *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d 1, 9 (D.D.C. 2016) (quoting *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990)); see also *State Farm Mut. Auto. Ins. Co. v. Physiomatrix, Inc.*, No. 12-CV-11500, 2013 WL 10936871, at *10 (E.D. Mich. Nov. 26, 2013) (noting that the discovery rules are not designed “to discover whether a claim exists” (quoting *McCurdy v. Wedgewood Cap. Mgmt. Co.*, No. CIV. A. 97-4304, 1998 WL 964185, at *11 (E.D. Pa. Nov. 16, 1998))); *Samuels v. Eleonora Beheer, B.V.*, 500 F. Supp. 1357, 1362 (S.D.N.Y.1980) (“The discovery rules are not a hunting license to conjure up a claim that does not exist.”), *aff’d*, 661 F.2d 907 (2d Cir. 1981).

Accordingly, the Commission must deny SOC’s motion because adopting SOC’s expansive view of the Commission’s access rules would effectively nullify the longstanding statutory and regulatory provisions that govern discovery in complaint proceedings.

B. SOC’s Motion for Access Fails to Satisfy the Substantive Standards of Rule 3011.301

Even assuming the Commission’s access rules were an appropriate mechanism for SOC to seek pre-litigation discovery (for the reasons stated above they are not), the substantive standards imposed by the access rules alone would require denial of SOC’s request. SOC has not and cannot make the threshold showing to establish good cause to access the requested non-public materials, as required by Rule 3011.301(b)(2).

SOC asserts it needs access to the non-public materials “so that SOC may investigate and initiate a complaint before the Commission pursuant to 39 USC § 3662. The SOC anticipates the complaint will allege that in its performance of [the contract], the Postal Service is giving undue preference to the counterparty to the contract, in violation of 39 USC § 403(c), is causing delays to

the delivery of equivalent service categories of “important letter mail,” in violation of 39 USC § 101(e), and is undermining “effective and regular postal services to rural areas,” in violation of 39 USC § 101(b).”³⁴ SOC further states that access to the non-public materials is necessary to assess whether the NSA includes “terms that on their face, or as applied” violate the Postal Service’s “core legal obligations not to discriminate between users, to prioritize letter mail, ... [and] to provide effective services to rural communities[.]” under sections 101(b), 101(e), and 403(c) of title 39.³⁵

As an initial matter, the Commission’s complaint jurisdiction under 39 U.S.C. § 3662(a) does not encompass claims arising under 39 U.S.C. §§ 101(b) or 101(e).³⁶ SOC thus cannot justify its request on the basis of alleged violations of sections 101(b) or 101(e) because the Commission has exclusive jurisdiction over rate and service complaints and is statutorily barred from hearing such claims. Accordingly, SOC’s only possible basis for establishing good cause would be a claim alleging unreasonable discrimination under section 403(c).

SOC’s initial rationale is that access is necessary to determine:

The precise service classes within which Amazon mail is to be delivered under the Contract because this information would clarify whether the conduct reported by our respondents is caused by undue preferencing of Amazon within service classes or by Amazon’s use of particular service classes.³⁷

As noted above, to the extent this rationale is predicated on bringing a complaint under section 101(e), it fails as a matter of law. This rationale also cannot support a valid claim under section 403(c) because it ignores that the Postal Service is expressly authorized to offer rates and classes “not of general applicability” to individual mailers to help attract and maintain profitable competitive package volumes. *See* 39 U.S.C. § 3632(b)(3). Courts and the Commission regularly defer to the Postal Service’s business judgments on these matters. *See, e.g., UPS Worldwide v. United States Postal Service*, 66 F.3d 621, 634-35 (3d Cir. 1995) (affirming Postal Service decision

³⁴ SOC August 15 Motion at 2.

³⁵ *Id.* at 8.

³⁶ 39 U.S.C. § 3662(a).

³⁷ SOC August 15 Motion at 9.

on international mail arrangements because it “reflects a reasonable business decision about the most effective means to solicit new customers;” Postal Service acted properly in basing more favorable treatment on a customer’s “capability . . . rather than actual performance” and deference to that decision was consistent with the intent of the postal reform laws to allow the Postal Service to adopt “modern business practices”). Moreover, courts and the Commission considering unlawful discrimination claims under section 403(c) begin by recognizing that, by its terms, section 403(c) does not prohibit price or service discrimination generally, but rather prohibits only “undue or unreasonable” price discrimination. As a federal appellate court has reasoned, the statute’s use of the terms “undue” and “unreasonable” necessarily means Congress understood that some differential treatment among mail users is permissible and is expected. *See UPS Worldwide*, 66 F.3d at 634 (“We cannot ignore that the ‘undue or unreasonable’ language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted.”). SOC has thus not even begun to assert a sufficient rationale for obtaining access to the highly sensitive information it seeks.

SOC’s second rationale is that access is necessary to determine:

Whether the contract includes terms on its face or as applied that could induce USPS management to unduly preference Amazon against other users within these classes such as terms that commit USPS to faster delivery standards than those for the applicable service class as a whole, or that provide inducements or penalties that incentivize USPS to deliver Amazon mail faster than other mail within the same class.³⁸

This justification fails for the same reasons as above. It is vague, content free, and conclusory. Additionally, the notion that SOC can justify access to non-public materials of extreme commercial sensitivity on the basis that it must independently evaluate whether the contract contains any “facial” violations of title 39 is unavailing. As SOC may not be aware, the Commission determined that the contract complies with all applicable laws before it took effect, and continues to

³⁸ *Id.*

monitor and review the contract for compliance with title 39 each year as part of its annual compliance determination. SOC's argument that it needs to independently check the Commission's compliance determination presupposes, contrary to fact, that the Commission is not discharging its statutory responsibilities. Such baseless conclusions cannot satisfy the good cause requirement for the sensitive information SOC seeks. Indeed, if "second guessing" the Commission's compliance function were an independent justification for access, any officious intermeddler could demand access to virtually any non-public information.

SOC's third rationale is that access is necessary to determine:

The particular locations where Amazon mail is to be delivered under Contract 44, and the terms applicable to those locations, in order to understand whether the Contract causes USPS to compromise services to rural communities.³⁹

As noted above, to the extent this rationale is predicated on bringing a complaint under section 101(b), it fails as a matter of law. The statement similarly fails to justify access in support of a claim under section 403(c). The Postal Service is entitled, as a matter of law, to enter into service contracts with an individual mailer for rates and services "not of generally applicability in the Nation as a whole or in any substantial region of the Nation." 39 U.S.C. § 3632(b)(3); *see also Newspaper Association of America v. PRC*, No. 12-1367 (D.C. Cir., Nov. 15, 2013) at 4 (upholding service contract with mailer that offered postage discounts only in select markets). Contrary to SOC's suggestion, the Postal Service is not under a legal obligation to provide delivery on uniform terms without regard to cost. Rather, the universal service obligation (USO) has always been understood to be "tempered by, and subject to, reasonable economic and efficiency limitations." PRC Docket No. PI2008-3, *Report on Universal Postal Service and the Postal Monopoly* (December 19, 2008) at 19. The suggestion that a profitable service contract with a larger shipper could somehow "compromise services to rural communities" betrays a fundamental misapprehension of both the statutory pricing

³⁹ *Id.*

requirements for competitive products and the basic economics of the Postal Service as a multi-product network firm with substantial fixed costs.

SOC's fourth and final rationale is that access is necessary to determine:

Whether the contract contains any other terms that on their face, or as applied, unduly preference Amazon by incentivizing or causing USPS not to enforce Amazon's obligations under the contract, for instance, regarding damage to USPS property or providing notice before terminating its use of particular post offices.⁴⁰

Again, without more, this rationale cannot justify access in support of a claim under section 403(c). The Postal Service's business judgments on these matters are the type of which the Commission and other reviewing agencies regularly defer. *See, e.g., UPS Worldwide*, 66 F.3d at 634-35; *Bovard v. United States Postal Service*, 47 F.3d 1178 (10th Cir. 1995) (rejecting section 403(c) unreasonable discrimination claim based on deference to Postal Service's "reasonable decision, rationally related to the effectuation of the Postal Service's statutory objectives of providing efficient delivery of the mails" (citing *Egger v. United States Postal Service*, 436 F. Supp. 138, 142 (W.D. Va. 1977))); *see also Grover City v. United States Postal Service*, 391 F. Supp. 982, 986 (C.D. Cal. 1975). As noted above, SOC's interest in independently evaluating the Commission's prior compliance findings cannot serve as good cause; if this purported reason were sufficient, every motion for access would need to be granted. Such an interpretation would invalidate the protections of Rule 3011.301.

C. A Balancing of the Interests Also Necessitates Denial of SOC's Motion for Access

For the reasons stated above, SOC cannot satisfy good cause as justification to access the non-public materials requested. In fact, the paucity of the stated rationale in support of the request confirms that SOC is making this request not because the information is relevant to a viable claim, but for the improper purpose of using the access rules to engage in pre-litigation discovery to find out if there is any basis for a claim.

⁴⁰ *Id.*

SOC frames the balancing of interests as primarily an issue of government accountability. That focus is too narrow, the issues are broader. In balancing the parties' interests on this issue, the Commission must consider not only the interests of the Postal Service's commercial partners, mailers, and shippers that have entered confidential service contracts, but also how this issue may affect other mailers and end customers, including those in remote and rural communities. The continuing growth and profitability of the Postal Service's competitive package products business is critical to the Postal Service's long-term financial viability.⁴¹ The contribution from the Postal Service's competitive package products business helps defray the cost of maintaining a nationwide delivery network necessary to meet the Postal Service's universal service obligation, including service to remote and rural customers who view affordable delivery services as a lifeline. Accordingly, the Commission must consider the longer-term consequences of a failure to rigorously enforce its access rules. A permissive ruling in this case will signal to litigants and others that a new vehicle is available to circumvent established discovery and Freedom of Information Act processes.

SOC discounts the significant chilling effect this could have on the Postal Service's ability to compete, noting that commercial partners are already on notice that the Postal Service may be forced to disclose confidential contract information. This position ignores the fact that commercial partners that use the Postal Service's competitive package products can protect themselves by contracting instead with private carriers who can provide assurance that the terms of their contracts will not be subject to permissive access rules.

Negotiated service agreements are appropriately subject to advance approval and continuing oversight by the Commission to ensure full compliance with the law. Allowing third-parties access to the most sensitive commercial information of the Postal Service and its shipping partners on the basis of unsupported allegations and speculation will create a chilling effect on the Postal Service's ability to compete in the highly-competitive package delivery business. As previously stated, even

⁴¹ See n.4, *supra*.

assuming the integrity of the Commission's protective conditions, increased access will necessarily lead to an increased risk of disclosure. Regardless of whether disclosure is intentional or inadvertent, the risk of harm to the Postal Service, its commercial shipping partners, competition, and the viability of the Postal Service's competitive products business is real.

CONCLUSION

For the reasons stated above, SOC's motion for access to non-public materials must be denied as procedurally improper and for failure to provide a detailed justification under 3011.301(b)(2).

Respectfully submitted,

/s/

Michael F. Scanlon
John Longstreth
Rachel Wofford
K&L GATES LLP
1601 K Street, NW
Washington, DC 20006
Telephone: (202) 661-3764
Email: michael.scanlon@klgates.com
john.longstreth@klgates.com
rachel.wofford@klgates.com

Counsel to AMAZON.COM SERVICES LLC